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Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 423

BRADFORD ELECTRIC LIGHT COMPANY, INC.,

Petitioner and Appellant Below

v.

JENNIE M. CLAPPER, ADMINISTRATRIX,

Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

By WILLIAM E. LEAHY,
GEORGE T. HUGHES,
STANLEY M. BURNS,

Counsel for Petitioner.

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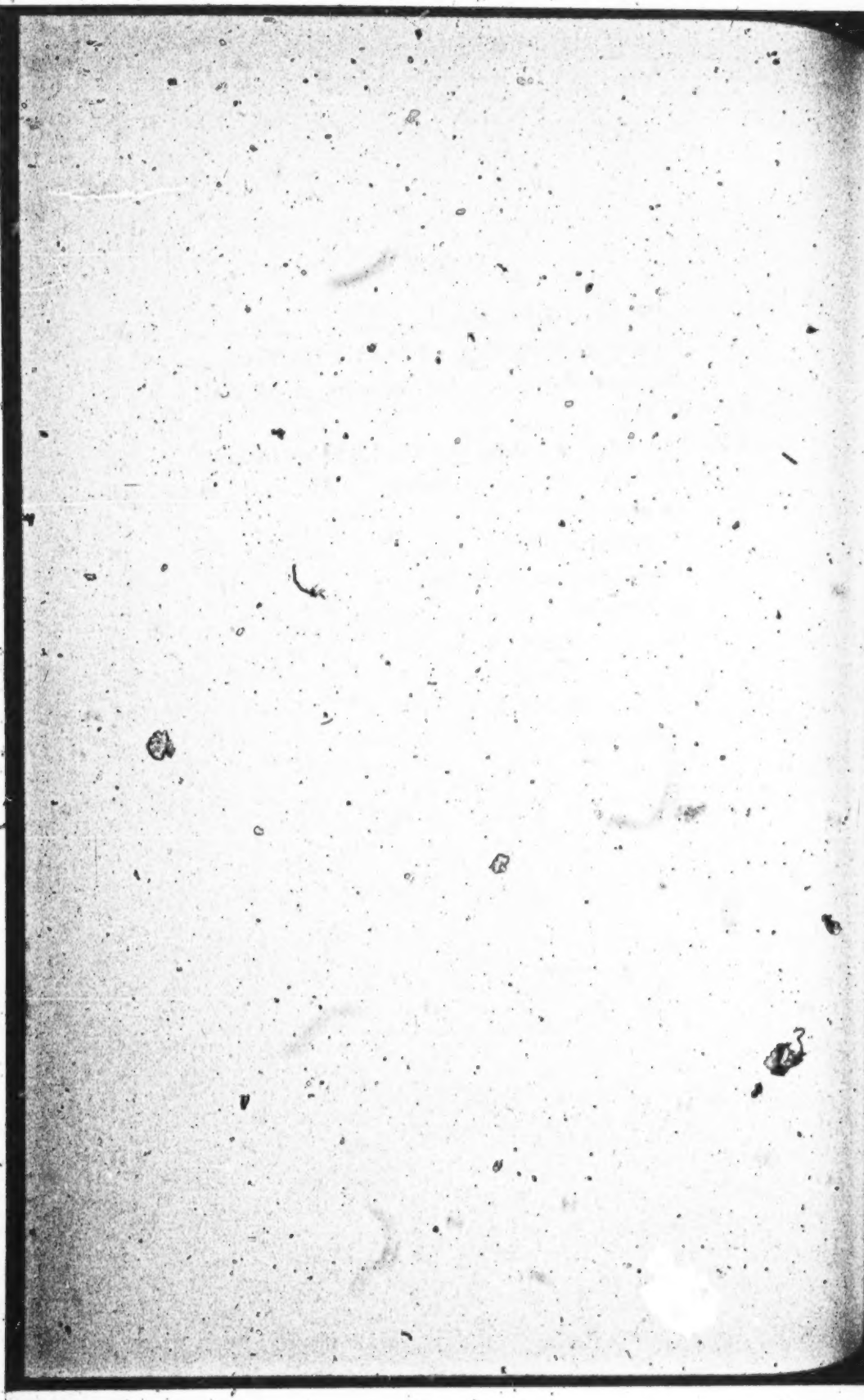

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Supreme Court of the United States.

OCTOBER TERM, 1931.

No.

BRADFORD ELECTRIC LIGHT COMPANY, INC.,

Petitioner and Appellant Below

v.

JENNIE M. CLAPPER, ADMINISTRATRIX,

Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully represents:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

(1) Your petitioner, the Bradford Electric Light Company, Inc., is a corporation duly established under the laws of the State of Vermont, with a principal place of business at Bradford in said State of Vermont, and is a resident and citizen of said State.

(2) That the respondent, Jennie M. Clapper, is administratrix of the Estate of Leon J. Clapper, late a resident of said Bradford, and at the time of his death was employed by said Bradford Electric Company in said State of Vermont to work within and without said State.

(3) That said Bradford Electric Light Company, Inc., is a public utility, and is engaged in the manufacture of electric energy in said State of Vermont, which is distributed through its transmission lines in said State of Vermont and across the Connecticut River serving various towns in the adjoining state of New Hampshire.

(4) That the said Leon J. Clapper while in the course of his employment sustained injuries resulting in his death in Haverhill, N. H., on July 30, 1926.

(5) That on said date, to wit, July 30, 1926, the said Bradford Electric Light Company, Inc., had accepted the provisions of the Workmen's Compensation Act of the State of Vermont, as more particularly set forth in the General Laws of the State of Vermont relating to labor, Chapter 241.

(6) That the said Leon J. Clapper had accepted the provisions of the Workmen's Compensation Act of said State of Vermont, and at the time of his death the rights, remedies and liabilities of the parties were governed and controlled exclusively by the provisions of said Act.

(7) That the provisions of said Act were extra-territorial and applied to injuries received by employees even though such injury was received outside of the State of Vermont.

(8) That Jennie M. Clapper of Manchester, County of Hillsborough, State of New Hampshire, was appointed administratrix of the Estate of her brother, Leon J. Clapper, and on September 16, 1927, instituted an action in the Superior Court for the County of Hillsborough, State of New Hampshire, against said Bradford Electric Light Company, Inc., at common law, to recover damages in the sum of $10,000 for the death of said Leon J. Clapper due to alleged negligence on the part of said Bradford Electric Light Company, Inc.

(9) That said Bradford Electric Light Company, Inc., removed said cause of action to the District Court of the United States for the First District on the ground of diversity of citizenship between the parties thereto, the said

Jennie M. Clapper being a resident and citizen of New Hampshire, and the said Bradford Electric Light Company, Inc., being a resident and citizen of said State of Vermont.

(10) After said action had been removed to the District Court of the United States for the First District, the said Bradford Electric Light Company, Inc., filed an answer denying liability on its part, and pleaded the Workmen's Compensation Act of the State of Vermont as a bar to the maintenance of said common law action in New Hampshire, and moved to dismiss same, said motion being as follows (Record, p. 21):

> "Now comes the defendant in the above entitled action, and defends and says that it is not guilty in manner and form as alleged by the plaintiff in her writ and declaration, and this it is ready to verify.
>
> And further answering, the defendant says
>
> 1. That it is a corporation duly established under the laws of the State of Vermont and having a principal place of business at Bradford in said State of Vermont.
>
> 2. That Leon J. Clapper at the time of his death and for some time prior thereto was a resident of said Bradford, Vt.
>
> 3. That said Bradford Electric Light Company, Inc., hired the said Leon J. Clapper in the State of Vermont to work within and outside of said State.
>
> 4. That the said Leon J. Clapper while in the employ of said defendant was killed at Haverhill in the County of Grafton and State of New Hampshire on July 30, 1926.
>
> 5. That the defendant has accepted the provisions of the Workmen's Compensation Act for the State of Vermont.
>
> 6. That the *General Laws of the State of Vermont* relating to Labor, Chapter 241, Section 5763, provide as follows:
>
> **'ELECTION OF EMPLOYER OR EMPLOYEE.**
>
> **The provisions of this chapter, except sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, shall not apply to an employer or employee unless prior to the injury they shall have so elected by agreement, either express or implied, as hereinafter provided. Such agreement**

shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this chapter, and shall bind the employee himself, his widow, the employee's widower, personal representative, and next of kin and dependents as hereinafter defined, as well as the employer and those conducting his business during bankruptcy or insolvency.'

7. That the *General Laws of the State of Vermont* relating to Labor, Chapter 241, Section 5765, provide as follows:

'SAME: AS TO CONTRACTS MADE SUBSEQUENT TO JULY FIRST, NINETEEN HUNDRED AND FIFTEEN. Every contract of hiring, verbal, written or implied, made subsequent to July first, nineteen hundred and fifteen, shall be presumed to have been made subject to the provisions of this chapter, unless there is, as a part of such contract, an express statement in writing prior to accident, either in the contract itself or by written notice by either party to the other and to said commissioner, that the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, are not intended to apply, and it shall be presumed that the parties have elected to be subject to the provisions of this chapter and to be bound thereby. In the employment of minors, this chapter shall be presumed to apply unless the notice is given by or to the parent or guardian of the minor. The agreement for the operation of the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, may be terminated by either party upon sixty days' notice to the other and to said commissioner, in writing prior to any accident.'

8. That the *General Laws of the State of Vermont* relating to Labor, Chapter 241, Section 5770, provide as follows:

'INJURIES OUTSIDE OF STATE. If a workman

who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state, even though such injury was received outside of this state.'

9. That the *General Laws of the State of Vermont* relating to Labor, Chapter 241, Section 5774, provide as follows:

'RIGHT TO COMPENSATION EXCLUSIVE: The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter, shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. Employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement.'

10. That the *General Laws of the State of Vermont* relating to Labor, Chapter 241, Section 5762, provide as follows:

'GENERAL POWERS OF COMMISSIONER. Questions arising under the provisions of this chapter, if not settled by agreement of the parties interested therein with the approval of said commissioner, shall, except as otherwise provided, be determined by said commissioner. The decisions of said commissioner shall be enforceable by the county court under the provisions of section five thousand eight hundred and nine. From such a decision an appeal shall lie in the same manner as other appeals from said commissioner; but in no case shall such an appeal operate as a supersedeas or stay unless said commissioner or the court to which such appeal is taken shall so order.'

11. That the said Leon J. Clapper was subject to the

provisions of the Workmen's Compensation Act of said State of Vermont as he had not filed with his employer or with the Commissioner of said State of Vermont, before the injury complained of, a declaration electing not to accept the provisions of the Workmen's Compensation Act of said State of Vermont as provided by said Act, and as further provided by said Act was presumed to have been operating under the contract of employment as defined by the Compensation Act.

12. That to permit the said plaintiff to maintain her common law action would be

(a) Contrary to the laws of the State of Vermont, the said Leon J. Clapper having at the time of his death accepted the provisions of the Workmen's Compensation Act for said State,

(b) A breach of his agreement with said Bradford Electric Light Company, Inc., to accept compensation under the provisions of the Workmen's Compensation Act, and

(c) Would work a great hardship, and perpetrate a fraud on said Bradford Electric Light Company, Inc.

13. That the acceptance of the provisions of the Workmen's Compensation Act for said State of Vermont by the said Leon J. Clapper, as above specifically set forth, is a bar to the plaintiff's present common law action.

14. That this Court has no jurisdiction over the parties to, or the subject matter of, said suit.

WHEREFORE, said defendant prays that the Court dismiss the plaintiff's common law action, and for such other and further relief as may be just."

(11) After the defendant had filed its answer and motion to dismiss, the plaintiff moved to reject defendant's answer and brief statement, which motion was as follows (Record, p. 25):

"Now comes the plaintiff and moves that the brief statement of defense submitted by the defendant under the plea of the general issue be rejected for the following reasons:

(1) That the Workmen's Compensation Law of Vermont has no extra-territorial force or effect and does not control the rights of the parties in this litigation.

(2) That the rights of the parties to this action are determinable solely by the laws of the State of New Hampshire.

(3) That the plaintiff's cause of action accrued under and

by virtue of the Laws of New Hampshire, the injury causing the death of the plaintiff's intestate, occurring while he was employed within said State.

(4) That the matters set forth in the defendant's brief statement do not constitute a valid and legal defense to the plaintiff's cause of action."

(12) After the filing of the foregoing motion the matter came on for a hearing before the presiding justice, and the following rescript was filed (Record, p. 26):

"This matter came on for hearing upon plaintiff's motion to reject the defendant's answer filed under the general issue.

Upon hearing the parties it appears that the special matter pleaded, which is really a plea to the jurisdiction to the Court, must be overruled and the case set for trial on its merits.

Actions under the Employers' Liability Act in New Hampshire are based on tort not on contract and the law of Vermont has no extra-territorial effect.

It is alleged that the deceased, Leon J. Clapper, accepted the provisions of the Workmen's Compensation Act for the State of Vermont, but it appears from the pleadings and the argument of counsel the only acceptance upon which the defendant relies is the failure of the deceased to file a declaration electing not to accept the provisions of the Act.

Defendant's motion to dismiss is denied."

(13) After the presiding justice of the District Court had dismissed defendant's motion and ordered it to proceed by trial by jury under the provisions of the New Hampshire law, the case was tried three times by jury, the first trial resulting in a disagreement, the second trial resulting in a verdict for plaintiff for $850, which was set aside, and the third trial resulting in a verdict for plaintiff in the sum of $4,000, and judgment was entered for this amount in favor of plaintiff and against defendant by order of the Court on December 9, 1929.

(14) As stated supra, a part of petitioner's distribution system extended into New Hampshire, where it maintained and operated substations and other equipment used in connection with the operation of its plant, and engaged em-

ployees who were residents of New Hampshire to work upon its lines within the State of New Hampshire.

(15) In the defense of the common law action instituted by the respondent, the Court having ruled that the case at bar was governed by the Employer's Liability Act of New Hampshire, and the Vermont law did not apply, and it appearing that the petitioner had engaged New Hampshire employees to work in New Hampshire upon that type of hazardous employment which came within the definition of the statute (N. H. Public Laws, 1926, c. 178, s. 1), it was incumbent upon the petitioner in order to avail itself of the defenses of assumption of risk and negligence of a fellow servant (Public Laws, c. 178, ss. 2, 3, 4), to prove that it had accepted the provisions of the New Hampshire Workmen's Compensation Act and that same were in force on the date of the accident. *Spilene* v. *Co.*, 79 N. H. 326.

(16) Accordingly, and as a part of petitioner's case, by reason of the Court's ruling before any evidence was introduced, the petitioner offered to prove that it had accepted the provisions of the New Hampshire Compensation Act, and that same were in effect on the date of the accident, but the respondent admitted the facts to be as stated in the offer of proof, and further proof became unnecessary (Record, p. 203).

(17) After the judgment had been entered in the District Court in favor of respondent and against the petitioner in the sum of $4,000, the petitioner seasonably filed a bill of exceptions, and the case was transferred to the Circuit Court of Appeals for the First Circuit.

(18) Thereafter the case was briefed and argued orally before Justices Bingham, Anderson and Wilson of the Circuit Court of Appeals for the First Circuit by counsel for the respective parties, and on January 8, 1931, by an opinion written by Judge Wilson, in which Judge Bingham concurred, the judgment of the District Court was vacated, the verdict set aside, and the case remanded to that court for

further proceedings not inconsistent with the opinion (Record, p. 361).

(19) Judge Anderson handed down a dissenting opinion (Record, p. 374).

(20) Thereafter counsel for the respondent seasonably filed a motion for a rehearing, and the case was again briefed and argued orally before the same Justices of the Circuit Court of Appeals for the First Circuit (Record, p. 389).

(21) On June 29, 1931, by an opinion written by Judge Anderson, in which Judge Bingham concurred, the majority opinion of the Circuit Court of Appeals handed down under date of January 8, 1931, was reversed, and the judgment of the District Court in favor of respondent was affirmed, with interest and costs (Record, p. 377).

(22) Judge Wilson wrote a dissenting opinion (Record, p. 379).

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The decision of said Circuit Court of Appeals as to the contract of employment entered into between the petitioner and respondent's intestate in the State of Vermont being a contract purporting to release an employer from liability for future negligence which could not be enforced in New Hampshire as contrary to the public policy of this state, is in conflict with the decision of the Circuit Court of Appeals for the Federal District of Kansas on the same matter in the case of *Ora Scott* v. *White Eagle Oil and Refining Company,* decided February 3, 1930.

(2) The Circuit Court of Appeals refused to apply the decisions of State and Federal Courts of last resort, and rendered a decision upon an important question of general law which is untenable and in conflict with the great weight of authorities.

(3) The particular decisions referred to are

Barnhart v. *Am. Concrete Steel Co.*, 227 N. Y. 531.
Martin v. *Kennecott Copper Corp.*, 252 Fed. 207.
Johnston v. *Kennecott Copper Corp.*, 248 Fed. 407.
Ora Scott v. *White Eagle Oil & Refining Co.*, Federal District Court of Kansas, decided Feb. 3, 1930.
Mulhall v. *Nashua Mfg. Co.*, 80 N. H. 194.
Northern Pacific v. *Babcock*, 154 U. S. 190.

(4) That the case at bar "is one of new impressions, and owing to the peculiar nature of the New Hampshire Employers' Liability & Compensation Act is unique in the issues it presents, and of importance to employers, especially in adjoining states". (Circuit Judge Wilson's dissenting opinion, Record, p. 379).

(5) The Circuit Court of Appeals, contrary to the provisions of Article IV, s. 1, of the Constitution of the United States, failed to give full faith and credit to the General Laws of Vermont relating to Labor, Chapt. 241, ss. 5763, 5765, 5770, 5774 and 5762 in the State of Vermont, which laws by agreement of the parties became a part of the contract of employment entered into between the employer and the employee, and each was bound by the exclusive rights and remedies thereunder.

Pollard v. *Bailey*, 20 Wall. 520, 527.
Galveston Ry. v. *Wallace*, 223 U. S. 481, 490.
Stewart v. *B. & O. R. R.*, 168 U. S. 445.
National Bank v. *Franklyn*, 120 U. S. 747, 753.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the First Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case numbered and en-

titled on its docket 2465, Bradford Electric Light Company, Inc., Defendant, Appellant, v. Jennie M. Clapper, Administratrix, Plaintiff, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said District Court be reviewed by the Court, and for such further relief as to this Court may seem proper.

Dated September 15, 1931.

BRADFORD ELECTRIC LIGHT COMPANY, INC.,
By WILLIAM E. LEAHY,
GEORGE T. HUGHES,
STANLEY M. BURNS,
Counsel for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1931.

BRADFORD ELECTRIC LIGHT COMPANY, INC.,

Petitioner

v.

JENNIE M. CLAPPER, ADMINISTRATRIX,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

I.

OPINIONS OF CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

The majority opinion of the Circuit Court of Appeals for the First Circuit was handed down under date of January 8, 1931 (Record, p. 361).

The dissenting opinion of Judge Anderson was handed down under date of January 8, 1931 (Record, p. 374).

The majority opinion of the Circuit Court of Appeals for the First Circuit was handed down under date of June 29, 1931 (Record, p. 377).

The dissenting opinion of Judge Wilson was handed down under date of June 29, 1931 (Record, p. 379).

II.

JURISDICTION.

(1) The date of the judgment to be reviewed is June 29, 1931.

(2) The jurisdiction of this Court to questions and issues herein involved is based upon the diversity of citizenship of the parties hereto, the petitioner, the Bradford Electric Light Company, Inc., being a resident and citizen of the State of Vermont, and the respondent, Jennie M. Clapper, being a resident and citizen of the State of New Hampshire.

(3) The amount involved is in excess of $3,000, exclusive of interest and costs (Record, pp. 10, 40).

(4) The authority believed to sustain said jurisdiction is United States Judicial Code, sec. 24, as amended.

III.

STATEMENT OF THE CASE.

The petitioner, Bradford Electric Light Company, Inc., is a corporation duly established under the laws of the State of Vermont, and is engaged as a public utility distributing electric energy through certain towns in said State of Ver-

mont, and across the Connecticut River into certain towns in the State of New Hampshire.

Leon J. Clapper was a resident of the State of Vermont, and was employed by the petitioner in Vermont in connection with the operation of its electrical system to work within and without said State of Vermont.

In connection with the operation of its plant the petitioner maintained a substation in Haverhill in the County of Grafton, State of New Hampshire, and on the evening of July 30, 1928, due to an electrical storm, fuses in the substation were burned out and Leon J. Clapper in the course of his employment went to the Haverhill substation for the purpose of replacing these burned out fuses, and while in the act of doing so, received the injuries resulting in his death.

The contract of employment of Leon J. Clapper by the petitioner was entered into in Vermont, and under the terms of the Workmen's Compensation Act of the State of Vermont in effect at the time of said employment the provisions of said Act entered into and became an integral part of the contract of employment, and the parties were presumed to have been bound thereby unless they expressly rejected said Act in accordance with its provisions.

At the time of the accident both parties had accepted said Act and neither had rejected it.

In addition to the acceptance of the Vermont Workmen's Compensation Act, the petitioner had also accepted the provisions of the Workmen's Compensation Act of the State of New Hampshire by reason of the fact that in the course of the operation of its business in New Hampshire it was necessary to engage residents of New Hampshire to work upon that type of employment which came within the classifications of the Act requiring employers to accept said Act for the benefit of themselves and their employees.

Other facts have already been stated in the preceding petition under the heading "Summary Statement of the Matter

Involved," which are hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

The District Court of the United States for the First District erred in holding

(1) That the contract of employment entered into in Vermont between the petitioner and Leon J. Clapper was a contract which purported to release an employer from liability for future negligence.

(2) That the contract of employment so entered into in Vermont between the petitioner and Leon J. Clapper was contrary to the public policy of New Hampshire.

(3) That the contract of employment entered into in Vermont was not a bar to the maintenance of a common law action in New Hampshire.

V.

ARGUMENT.

A.

The contract of employment entered into in Vermont between the Bradford Electric Light Company and Leon J. Clapper was not a contract which purported to release an employer from liability for future negligence.

It is conceded that the Bradford Electric Light Company is a Vermont corporation, is a resident and citizen of said State of Vermont, with a principal place of business at Bradford, Vt.; that Leon J. Clapper was a resident and citizen of said State of Vermont, and never resided in New Hampshire; that the contract of employment between the parties was made in Vermont; that the said Leon J. Clapper was employed to work within and without said State, and no new contract of employment was ever made in New Hampshire.

At the time Leon J. Clapper entered the employ of the Company, the *General Laws of Vermont* relating to Labor, Chap. 241, provided as follows:

"SECTION 5763: ELECTION OF EMPLOYER OR EMPLOYEE. The provisions of this chapter, except sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, shall not apply to an employer or employee unless prior to the injury they shall have so elected by agreement, either express or implied, as hereinafter provided. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this chapter, and shall bind the employee himself, his widow, the employee's widower, personal representative and next of kin and dependents as hereinafter defined, as well as the employer and those conducting his business during bankruptcy or insolvency."

"SECTION 5765: SAME; AS TO CONTRACTS MADE SUBSEQUENT TO JULY FIRST, NINETEEN HUNDRED AND FIFTEEN. Every contract of hiring, verbal, written or implied, made subsequent to July first, nineteen hundred and fifteen, shall be presumed to have been made subject to the provisions of this chapter, unless there is, as a part of such contract, an express statement in writing prior to accident, either in the contract itself or by written notice by either party to the other and to said commissioner, that the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, are not intended to apply, and it shall be presumed that the parties have elected to be subject to the provisions of this chapter and to be bound thereby. In the employment of minors, this chapter shall be presumed to apply unless the notice is given by or to the parent or guardian of the minor. The agreement for the operation of the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, may be terminated by either party upon sixty days' notice to the other and to said commissioner, in writing prior to any accident."

"SECTION 5770: INJURIES OUTSIDE OF STATE. If a workman who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state, even though such injury was received outside of this state."

It is further conceded that at the time Leon J. Clapper received the injuries resulting in his death, neither the employer nor employee had filed a declaration electing not to accept the provisions of the Workmen's Compensation Act as provided by this Act, and therefore, the provisions of the statute became a part of the contract of employment.

The Vermont Act is what is known as the elective type, and in the event of the failure of the employee to elect not to be bound by the provisions of the Act, so as to retain his common law rights, he is bound by the exclusive remedies provided for in the Act.

Smith v. *Van Noy Interstate Co.*, 262 S. W. 1048.
Kennerson v. *Thames Towboat Co.*, 89 Conn. 367, 371.
Powers v. *Hotel Bond Co.*, 89 Conn. 143, 147.
Hopkins v. *Matchless Metal Polish Co.*, 99 Conn. 457, 460.
Gooding v. *Ott*, 77 W. Va. 467.
Hunter v. *Coal Co.*, 175 Ia. 245.
Denny v. *Comp.*, 36 N. J. L. 121.
Industrial Comm. v. *Ins. Co.*, 64 Col. 490.
Dettloff v. *Co.*, 195 Mich. 117.
Grinnell v. *Wilkinson*, 39 R. I. 447.
Barnhart v. *Steel Co.*, 227 N. Y. 531.
Martin v. *Copper Corp.*, 252 Fed. 397.

One of the principal reasons advanced by the Circuit Court in sustaining the verdict in favor of the respondent was that the contract of employment entered into between the parties in Vermont purported to release the employer from liability

for future negligence and therefore could not be sustained in New Hampshire, where the injury was received.

The contract of employment entered into between the parties embodied the terms of the Vermont Workmen's Compensation Act. Does this Act purport to release the employer from liability for future negligence?

It is true that there are a line of decisions which hold that any contract entered into between an employer and employee which is intended to relieve the employer from *all* liability of whatsoever nature in the event of the employer's negligence resulting in injury to the employee is void as against public policy.

Baker v. *Railroad*, 74 N. H. 100.
Piper v. *Railroad*, 75 N. H. 228.
Conn v. *Amusement Co.*, 79 N. H. 450.
Wessman v. *Railroad*, 84 N. H.
Johnston v. *Fargo*, 184 N. Y. 379.

The contract in the case at bar, however, is not a contract of that type. It is just the reverse. In this case the contract entered into between the employer and employee provided for payment of compensation in the event of injury arising in the course of his employment regardless of, and aside from, any negligence on the part of the employer. The employee could recover in this case, under his contract of employment without allegation or proof of negligence on the part of his employer, and the defenses of contributory negligence, assumption of risk and negligence of a fellow servant were not available to the employer to preclude recovery on the part of the injured employee.

The distinction between the class of cases relied upon by respondent as relieving an employer from liability for future negligence and that class of cases wherein the employer agrees to pay the injured employee regardless of negligence, is made in the recent case of *Western Union Telegraph Company* v. *Esther Tompa*, decided July 17, 1931, by the United States Circuit Court of Appeals, Second Circuit.

In the *Tompa* case:

"The plaintiff employed the defendant to work as a cook on its work trains. While so employed on a train operated over the right of way of the New York Central Railway Company in the State of New York, she was injured when the plaintiff's train, on which she was working, collided with one of the railroad's trains, at a siding at Cohoes, New York, on September 23, 1927. The plaintiff was, and is, willing and able to pay her compensation for the injury in accordance with the provisions of the New York Workmen's Compensation Law and did make one payment to her on January 30, 1928. Thereafter, she brought suit in the New York Supreme Court against the New York Central Railroad Company to recover her damages for the injury. That company thereupon notified this plaintiff that it would look to it for reimbursement for all damage and expense suffered by reason of such suit in accordance with a contract of which the material part is later summarized. The plaintiff then brought this suit to restrain the defendant from proceeding with her action against the railroad company and to require her specific performance of an agreement she made with the defendant relating to compensation for injuries or death.

At the time the defendant was employed by the plaintiff and continuously up to and including the date she was injured, there was in force between the plaintiff and the railroad company a contract which the railroad company's predecessor had made with the plaintiff to the effect, *inter alia*, that if any employee of the plaintiff was injured in the course of his employment and while on the premises of the railroad company, the plaintiff would indemnify and save the railroad company harmless from all loss or damage of any kind arising from such injury to such employee.

When the defendant entered the employ of the plaintiff, she signed the following agreement:—

'Whereas, the Western Union Telegraph Company has adopted and now has in effect a relief plan for the payment of compensation to its employees in the event of their accidental injury or death occurring in the course of their employment; and whereas in the course of my duties as an employee of the above named company, it will be necessary for me from time to time to travel over

lines of railroads which the above named company has contracted to indemnify against any liability for injury to or death of persons in its employ while traveling or being on the railroad companies' premises or rights of way in connection with the telegraph company's business, either on a pass or otherwise; now, therefore, it is stipulated and agreed to by me, in consideration of my employment by the said company, and as a term or condition of such employment, that in case of my accidental injury or death in the course of my employment for the said company while traveling or being on the premises or right of way of any such railroad, I, or my personal representatives, will look for compensation solely to The Western Union Telegraph Company's relief plan before referred to, of which I have been furnished a copy and with which I am familiar, or to the Workmen's Compensation Act, if any, which may apply in such case, and that no railroad company which my said employer may have agreed to indemnify against liability for my injury or death shall be liable to me or my personal representative for such injury or death, whether or not the same shall be caused by the negligence of such railroad company or its servants.

Ester Tompa Cook
(Signature)
January 25, 1927
Date

Geo. Hillman,
Witness.

It remained unchanged at the time she was injured and the District Court decided, after hearing and considering evidence on that subject, that when she signed the agreement she did so freely after it was explained to her and she understood its meaning. Insisting that it is bound to indemnify the railroad for any loss or damage it may suffer by reason of the suit the defendant has brought against it and relying upon the defendant's agreement above set forth, the plaintiff now seeks injunctive relief on the theory that it has no complete and adequate remedy at law in that the defendant has no property and so is judgment proof. The defendant has taken the position that the plaintiff has no remedy at all in

this action because 28 U. S. C. A. Sec. 379 forbids the issuance of an injunction and also because there is no equity in this suit since the agreement of the defendant is against public policy and void."

The Court, in its opinion, said:

"The agreement does not limit the liability of the plaintiff to any private plaint of its own for the payment of compensation to its injured employees but leaves such liability as there may be under the provisions of the New York Workmen's Compensation Law unimpaired. It does deny to the plaintiff the right to sue a third person. We think that such agreements as that made by the defendant have already been held by controlling authority not to be contrary to public policy but valid and enforceable. *Wells Fargo & Co. v. Taylor*, 254 U. S. 175. Compare, *Baltimore & Ohio Southwestern Railway Co. v. Voigt*, 176 U. S. 498."

As the Court, Wilson, J., said in the case at bar:

"It is true that contracts for relief against future negligence in this country are held void as against public policy; but a contract for adequate compensation in case of injury by accident, whether due to negligence of either employer or employee, or occurring without the negligence of either, is quite different from a contract under which an employee receives no benefit, but relieves the employer from all liability for future negligence. In the one case, it is held to be a contract in the interest of the workman, and in the other, that it is so hostile to his interest and so conducive to neglect on the part of the employer to provide the ordinary provisions of safety for its employees, that it is, so far as we know, upheld by no court in this country."

(See dissenting opinion, Record p. 382.)

Assuming, but not conceding, that the contract in question is of that type claimed by the employee, i.e., a contract relieving an employer from liability for future negligence, it is valid in Vermont where made, and therefore should be recognized and enforced in New Hampshire.

Fonseca v. Cunard Steamship Line, 153 Mass. 553, 557.

O'Regan v. *Cunard Steamship Line*, 160 Mass. 356, 361.

Stone v. *Old Colony St. Railway*, 212 Mass. 459, 464.

Mittenthal v. *Mascagni*, 183 Mass. 19.

Wells Fargo & Co. v. *Taylor*, 254 U. S. 175, 188.

Smith v. *Godfrey*, 28 N. H. 379.

In the case of *Barnhart, Admx.* v. *The American Concrete Steel Co.*, 227 N. Y. 531, the plaintiff was employed in New Jersey by a New Jersey corporation and was killed while temporarily working in New York. At the time of his employment New Jersey had a compensation act the provisions of which were analogous to the Vermont Act. Suit was instituted at common law in New York to recover damages for his death and the plaintiff claimed that the New Jersey Workmen's Compensation Act did not apply because it was contrary to the public policy of New York, citing and relying upon *Johnston* v. *Fargo*, 184 N. Y. 379, which was an agreement relieving an employer from liability for future negligence.

In dismissing the common law action the Court, McLaughlin, J., said (p. 537):

> "I can see no analogy between this case and the case presented in *Johnston* v. *Fargo* (supra). This is not an attempt to relieve the employer from liability. It is nothing more than an attempt to establish a scale of compensation which shall give the employee a remedy for all injuries, whether due to negligence or not. There is no doubt that such a contract would bind the employer, and if so, no reason has been suggested why it ought not to bind the employee. If it did bind him, then at the moment of his death his common-law right of action had been barred, and being barred against him, it was barred also against his representatives. The contract of employment was valid in New Jersey, and being so, prevents the maintenance of an action for the recovery here sought in New York. *Piatt* v. *Swift & Co.*, 188 Mo. App. 584; *Pendar* v. *H & B American Machine Co.*, 35 R. I. 321."

B.

The contract of employment entered into in Vermont between the Bradford Electric Light Company, Inc., and Leon J. Clapper was not contrary to the public policy of New Hampshire.

The majority opinion sustaining the verdict in the District Court was based upon the ground that the contract of employment between the parties changed the public policy of New Hampshire.

(Opinion, Record, pp. 377, 378.)

In the case of *Johnson* v. *Ismert-Hincke Company*, 116 Kan. 734, the Court said:

> "The Workmen's Compensation Law fixed the liability of an employer to his employee where both parties are under the law, and this liability is founded upon the contract of employment and the statute. The liability in no sense depends upon tort. It is a liability growing out of a contract, the terms of the statute being embodied in the contract."

That the terms of the Workmen's Compensation Act of Vermont entered into and formed a part of the contract of employment between the parties is not seriously contested by the respondent but it is claimed that the Workmen's Compensation Act of Vermont is contrary to the public policy of New Hampshire because it differs in some of its terms and provisions from the New Hampshire Workmen's Compensation Act:

> "But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the public policy of the laws of the latter state. Every day our Courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the public policy of our laws, it must appear that it is against good

morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our citizens."

Northern Pac. Ry. Co. v. Babcock, 154 U. S. 190; Opinion, pp. 372, 373.

It is to be noted with interest that the majority opinion states no reasons nor cites any cases in support of its position.

If the case of *Saloshin, Admx. v. Houle (N. H.)* decided May 5, 1931, is cited as an authority in support of the Court's position it is clearly inapplicable and not in point.

We are in accord with the analysis of the *Saloshin* case as made by Wilson, J., in his dissenting opinion (Record, p. 381), and contend that it is an authority for, rather than against, the petitioner.

The Workmen's Compensation Act of Vermont differs from that of New Hampshire in that under the Vermont Act the employee must make his election to retain his common law rights when entering the employ of his master and prior to receiving the injury, otherwise he is presumed to have accepted and is bound by the provisions of the Act, while in New Hampshire the employee has the right to elect *after* receiving the injury, whether he will accept compensation or proceed at common law.

It is because of this difference it is contended the Vermont Act is contrary to the public policy of New Hampshire.

The term "public policy" has been judicially defined numerous times but the majority of courts agree that under the rules of comity, contracts valid in the state where made will be enforced unless the agreement "is contrary to good morals of the state or its citizens would be injured by its enforcement or it persistently violates positive written or unwritten [illegible] law."

We respectfully submit that a careful analysis and comparison of the two acts will satisfy this Court that the Ver-

mont Act is not contrary to the public policy of New Hampshire:

"The mere fact that statutes of different states, of the same general character, differ in some feature, does not render a contract entered into in one state and valid under its statute unenforcible in another state because it does not conform to its statute."

Swann v. *Swann*, 21 Fed. 299, 306.
Reynolds v. *Day*, 79 Wash. 499, 502.
Herrick v. *Minn. & St. L. R. Co.*, 31 Minn. 11.
Northern Pac. v. *Babcock*, 154 U. S. 190.
Chicago & E. I. R. Co. v. *Rouse*, 178 Ill. 102.
Higgins v. *Central N. E. & W. R. Co.*, 155 Mass. 176, 180.
Dennick v. *R. R. C.*, 103 U. S. 11.
Barnhart v. *Am. Concrete Steel Co.*, 227 N. Y. 531.
Schweitzer v. *Hamburg-American Line*, 138 N. Y. S., 944.
Howard v. *Howard*, *N. Car. Sup. Ct.*, decided April 1, 1931.
Bliss v. *Houghton*, 16 N. H. 90, 91, 92.
Adams v. *Gay*, 19 Vt. 358, 367.
2 Kent 117, 118.

Dissenting opinion, Record p. 384.

Great emphasis is laid by the Court upon the fact that the employer had accepted the provisions of the New Hampshire Workmen's Compensation Act (Opinion, Record, p. 377).

In considering this phase of the case it is important that we should consider somewhat the facts of the case and its history leading up to the acceptance of the Workmen's Compensation Act in New Hampshire by petitioner, and when that fact first appeared in connection with the trial of this cause.

The petitioner is a Vermont corporation with a principal place of business at Bradford, Vermont (Record, p. 204). It is engaged in the manufacturing and distribution of electric energy. The current is manufactured in Vermont and distributed through wires of the Company through certain sections of Vermont and across the boundary line into New Hampshire. In connection with its New Hampshire properties it of necessity had to employ New Hampshire help to operate in that state.

The respondent, Leon J. Clapper, was domiciled in, and a resident of, Vermont. The contract of hiring was made in Vermont. His employment required him to perform services within and without the State of Vermont.

No new contract of employment was made when the employee performed services outside of the State of Vermont. These services outside of the State were rendered under the contract made in Vermont.

At no time while in the employ of petitioner had he ever resided in New Hampshire, and whenever he had any work to perform in New Hampshire it was of a temporary nature and under the supervision and control of the Bradford office.

At the time he received the injuries complained of in this action, he was temporarily engaged in New Hampshire in performing work upon the petitioner's Haverhill substation.

The case at bar was first filed in the state court by the respondent Jennie M. Clapper, who was then a resident of New Hampshire, in her capacity as administratrix of her brother's estate (Record, p. 3).

The case was transferred to the United States District Court upon petition of the petitioner by reason of the diversity of citizenship of the parties (Record, pp. 4, 5).

When the case was filed in the District Court petitioner filed an answer and brief statement setting forth therein for the first time the fact that respondent's deceased and petitioner had accepted the provisions of, and were bound by, the Vermont Workmen's Compensation Act which was a bar to

the maintenance of this action in New Hampshire (Record, pp. 21, 22, 23, 24).

The respondent filed a Motion to Reject Defendant's Answer and Brief Statement, and assigned therein four reasons why same should be rejected, but it is important to note at this time and in this respect that respondent did not assign as a reason for petitioner's answer being rejected that it had accepted the provisions of the New Hampshire Workmen's Compensation Act (Record, p. 25).

The Court, in its rescript, denied petitioner's motion to dismiss, granted respondent's motion to reject petitioner's answer, and ordered petitioner to go to trial by jury (Record, p. 26). But again no reference is made to the acceptance of the Workmen's Compensation Act of New Hampshire by the petitioner as a reason or basis for denying petitioner's motion to dismiss.

The respondent's motion to reject petitioner's answer was treated by the trial Court and counsel as a demurrer to petitioner's answer and admitted the facts therein set forth. The Court, in its opinion, has so treated the motion (Opinion, p. 364).

The petitioner's answer was complete in that it contained sufficient facts, if proved, to bar respondent's cause of action. By his demurrer, counsel for the respondent admitted all of the facts alleged by the petitioner in its answer, and therefore obviated the necessity of proving same.

The Court in its Rescript said:

> "Actions under the Emplorer's Liability Act in New Hampshire are based on tort, not on contract, and the law of Vermont has no extra-territorial effect." (Record, p. 26.)

By its ruling the Court eliminated the law of Vermont so far as it was applicable to this case, and ordered the petitioner to go to trial under the law of New Hampshire.

Unfortunately, the rule in the Federal Court is such that legal problems arising during the course of the trial cannot be transferred to the Circuit Court of Appeals for judicial

determination until a judgment has been rendered in the District Court. Were the law the same as in our State Court, upon the Court denying the petitioner's motion to dismiss, and granting respondent's motion to reject, the case could immediately have been transferred to the Circuit Court upon petitioner's exception to the Court's ruling, and the same proposition which is now before the Court would then have been presented for this Court's consideration, and the parties involved would have been saved the time and expense of three jury trials.

Furthermore, and this is important, the acceptance of the New Hampshire Workmen's Compensation Act by the petitioner would not then have been presented to this Court and the respondent would have been deprived of that comfort and support which she now attempts to receive from the fact that the petitioner had accepted the New Hampshire Act.

Having been ordered to go to trial in New Hampshire in an action brought by the Administratrix of the Estate of an employee injured in New Hampshire, which action was brought under the Lord Campbell Act of New Hampshire, Chap. 302, P. L. 1926, it was incumbent upon the petitioner to protect its interests by every defense available to it under the New Hampshire law, and from then on the Vermont law was not available to the petitioner as a defense, nor material in any way under the issues raised by the respondent.

As a part of the respondent's case it appeared that three men from Berlin, New Hampshire, came down and assisted in the construction of the line from Pike, New Hampshire, to Lake Tarlton, New Hampshire. These men were linemen and did the same kind of work as Clapper and the others in the construction and reconstruction of the line upon which the respondent subsequently was fatally injured (Record, p. 137).

The Court having ruled that the acceptance of the Vermont Workmen's Compensation Act by both employer and employee was not a bar to the maintenance of the employee's

common law suit in New Hampshire and it appearing that the petitioner had engaged New Hampshire employees to work in New Hampshire upon that type of hazardous employment which came within the definition of the statute, i.e., "the construction, operation, alteration or repair of wires or lines of wires, cables, switchboards, or apparatus charged with electricity" (N. H. Public Laws, 1926, c. 178, s. 1), it was incumbent upon the petitioner, in order to avail itself of the defenses of assumption of risk and negligence of a fellow servant (Public Laws, c. 178, ss. 2, 3, 4), to prove that it had accepted the provisions of the New Hampshire Workmen's Compensation Act, and that same were in force on the date of this accident.

> "In a servant's action for injuries caused by his master's negligence, the burden is on the latter to show that he has accepted the compensation provisions of the employer's liability act (Laws 1911, c. 163); in the absence of proof of such acceptance assumption of the risk is not a defense."
>
> *Spilene* v. *Company*, 79 N. H. 326.

Accordingly, and as a part of the petitioner's case, before any evidence was introduced, the petitioner offered to prove that it had accepted the provisions of the New Hampshire Workmen's Compensation Act, and that same were in effect on the date of the accident, but the respondent admitted the facts to be as stated in the offer and further proof became unnecessary (Record, p. 203), but by so doing the petitioner did not assent to the New Hampshire Act alone governing the rights of the parties nor waive any rights it had under its motion to dismiss.

If there was any question on the part of the respondent that the petitioner had accepted the Workmen's Compensation Act of New Hampshire for the benefit of others than its New Hampshire employees, it had the opportunity then and there to make further inquiry to elicit this information, but as the facts were admitted to be as offered by petitioner, it is apparent that it was obvious to respondent's counsel

why the New Hampshire Act had been accepted by petitioner.

And, indeed, it is perfectly apparent and obvious to anyone why petitioner had accepted the New Hampshire Act. The evidence disclosed that the petitioner's lines ran through and served the towns of Haverhill, Woodville, Bath, Lisbon, Littleton and Bethlehem, all of which were in New Hampshire (Record, p. 207).

Assume, for the purpose of argument, that one of the three men who came down from Berlin to assist in the construction of the line (Record, pp. 137, 234) had been injured within the scope of his employment. Certainly it would have been no defense as to this injured employee for the petitioner to assert and rely upon the acceptance by it of the Vermont Workmen's Compensation Act and not the New Hampshire Act. And why? Because the employee from Berlin was domiciled and resident in New Hampshire, the contract of employment with him was made in New Hampshire, and he was governed and controlled by the New Hampshire Act. It can not reasonably, logically and legally be contended that the Berlin employee and Clapper were in the same category and that their cases would be governed by the same Workmen's Compensation Acts.

As the Court said in the case at bar:

> "The defendant company accepted the New Hampshire Act, but neither the deceased nor his representative ever did. While the defendant's reasons for so doing were not disclosed by direct testimony it appears in the record that its operations extended some distance into New Hampshire, and it perforce must at times, at least, have employed men in that State as well as in Vermont. If it wished to retain its common law defenses as to these men, it must accept the act."
>
> (Opinion, Record, p. 366.)

Workmen's Compensation Acts, in various states, the terms of which are almost identical with those in the case at bar, have been considered by the Federal Courts and the courts of last resort of various States, and in no case has any

such statute been held invalid as against public policy, or in violation of any constitutional provision on this ground.

Opinion of Justices, 209 Mass. 607, 610, 611.
Mackin v. *Company*, 187 Mich. 8.
American Rad. Co. v. *Rogge*, 86 N. J. L. 436.
Johnston v. *Corp.*, 248 Fed. 407.
Hopkins v. *Comp.*, 99 Conn. 457, 460.
Cram v. *Riley*, 214 Mich. 218.
Industrial Commission v. *Ins. Co.*, 64 Col. 480.
Rounsaville v. *Comp.*, 87 N. J. L. 371.
Pierce v. *Storage Comp.*, 185 Iowa 1346.
Foughty v. *Ott*, 80 W. Va. 88.
Chambers v. *District Court*, 139 Minn. 205.
Anderson v. *Comp.*, 169 Wis. 106.
Post v. *Berger & Gohlke*, 216 N. Y. 544.
Hospers v. *Smith*, 230 N. Y. 616.

"It is now well settled that Compensation Acts are not contrary to public policy, but are everywhere recognized as humane, economic and in the interest of the employee and the general welfare of the state; and nowhere is this more admirably stated than in *Mulhall* v. *Nashua Mfg. Co.*, 80 N. H. 194.

* * * * *

In view of the declarations in *Mulhall* v. *Nashua Mfg. Co.*, *supra*, we cannot conceive of the New Hampshire court of last resort holding as a general proposition that a statute, which has been adopted in so many states, and acclaimed far and wide as one of the most beneficent acts of recent years in promoting the general welfare of the workingman, is contrary to the general welfare of the citizens of New Hampshire."

Opinion, Record, pp. 369, 370.

C.

The contract of employment entered into in Vermont between the Bradford Electric Light Company, Inc., and

Leon J. Clapper was a bar to the maintenance of a common law action in New Hampshire.

The *General Laws of Vermont*, relating to Labor, in effect at the time Leon J. Clapper entered the company's employ and at the time of the accident in question, provided as follows (Chapter 241, Section 5774):

> "RIGHT TO COMPENSATION EXCLUSIVE: The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter, shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. Employers who hire workmen within this state to work outside of the state may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement."

Reference to the above statute discloses that the remedies provided thereby are exclusive of all other remedies in the case of injuries. This is the universal rule and has been adopted and approved almost unanimously by the Courts which have had occasion to consider this phase of the Act.

Kennerson v. *Thames Towboat Co.*, 89 Conn. 367, 371.
Powers v. *Hotel Bond Co.*, 89 Conn. 143, 147.
Hopkins v. *Metal Polish Co.*, 99 Conn. 457, 460.
Gooding v. *Ott*, 77 W. Va. 467.
Hunter v. *Coal Co.*, 175 Ia. 245.
Denny v. *Co.*, 38 N. J. Law J. 121.
Industrial Commission v. *Ins. Co.*, 64 Col. 480.
Dettloff v. *Co.*, 195 Mich. 117.
Grinnell v. *Wilkinson*, 39 R. I. 447.
Barbaro v. *Co.*, 227 N. Y. 581.

Martin v. *Corp.*, 252 Fed. 297.
Ora Scott v. *White Eagle Oil & Refining Co.*, District Court of United States, District of Kansas decided February 3, 1930.

"As between the employer and employee the remedy provided by the Workmen's Compensation Law is exclusive."

Shade v. *Co.*, 92 Kan. 146.
McRoberts v. *Co.*, 93 Kan. 364.
Moeser v. *Shunk*, 116 Kan. 247.
Johnson v. *Co.*, 116 Kan. 734.
Grant Smith-Porter Ship Co. v. *Rohde*, 257 U. S. 469.

The *General Laws of New Hampshire*, 1926, in effect at the time the common law suit was instituted in this State, provided as follows (Chapter 178, Section 11):

"BARRING SUIT AT LAW. The right of action for damages caused by any such injury, at common law or under any statute, shall not be affected by this chapter, but in case the injured workman, or in event of his death his executor or administrator, shall avail himself of this chapter, either by accepting any compensation hereunder, by giving the notice hereinafter prescribed, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in every action at common law or under any other statute on account of the same injury."

By the provisions of the Vermont Act the employee is presumed to have accepted its terms in the absence of the filing of a declaration not to be bound by it. No such declaration was filed by the employee in the case at bar. It is to be noted further that the Vermont Workmen's Compensation Act contains the so called extra-territorial clause and applies to injuries arising outside of the State of Vermont and of necessity covers the accident in question. It therefore follows that prior to the institution of the common law suit in New Hampshire the employee had already accepted, and was bound by,

the provisions of the Vermont Workmen's Compensation Act which not only by its terms, but by the statutes and decisions in New Hampshire barred his estate from maintaining a common law action in New Hampshire.

> **"One who has accepted the provisions of the Workmen's Compensation Act is barred from maintaining a common law action for negligence to recover for the same injury."**
>
> *Watts* v. *Company*, 79 N. H. 299.
> *Davis* v. *Company*, 82 N. H. 87.

If the employee or his representatives had applied for compensation in New Hampshire under the New Hampshire Workmen's Compensation Act the petition would be dismissed and the employee referred to Vermont where the contract of employment was made. The New Hampshire courts would have had no jurisdiction to grant compensation under the New Hampshire Act.

Hopkins v. *Comp.*, 99 Conn. 457.
Pettiti v. *Pardy Construction Co.*, 103 Conn. 101, 109.
Minto v. *Hitchings*, 198 N. Y. S. 610.
Schweitzer v. *Hamburg-American Line*, 138 N. Y. S. 944.
Barnhart v. *Co.*, 227 N. Y. 531.
Norman v. *Furniture Co.*, 84 Ind. App. 173.
Mosely v. *Fuel Co.*, 313 Mo. 225.
Wasilewski v. *Warner Co.*, 149 N. Y. S. 1035.

The Courts have repeatedly granted compensation in accordance with the provisions of the Workmen's Compensation Act in the state where the contract of employment was made even though the injuries were received outside the state of employment.

Smith v. *Van Noy Interstate Co.*, 150 Tenn. 25.
Zurich Co. v. *Ind. Comm. Wis.*, 213 S. W. 630.
Kennerson v. *Comp.*, 89 Conn. 367.

Haulfroit v. *Escanaba Mfg. Co.*, 188 N. W. 411.
Cram v. *Riley*, 214 Mich. 218.
Post v. *Burger-Gohlke*, 216 N. Y. 544.
Pederzoli's Case, Sup. Ct. Mass., decided Jan. 3, 1930.
Sanders' Case, 126 Maine 144.

VI.

CONCLUSION.

"We are of the opinion that there is nothing in the contract entered into between these parties in Vermont that is contrary to the main purpose of the New Hampshire act or inimical to the welfare of its citizens, and according to the trend of recent decisions in other jurisdictions, the contract of hire under the Vermont Act, upon the principles of comity, constitutes a good defense to an action under the New Hampshire death statute, there having been no contract of hire in New Hampshire."

Opinion, Record, p. 374.

Judge Wilson in his dissenting opinion, used the following language:

"I desire particularly to go on record as opposed to the ruling of the majority opinion that New Hampshire will not recognize a contract of employment under a Workmen's Compensation Act of another state that requires the assent of the workman before an injury to entitle him to its benefits, on the ground that it is contrary to the public policy of New Hampshire. The New Hampshire court has never so declared, and we cannot conceive of any court holding that a statute so generally held to be conceived in the interest of the workingman was inconsistent with the welfare of the citizens of New Hampshire. See *Mulhall* v. *Mfg. Co.*, 80 N. H. 194.

* * * *

I am firmly of the opinion that there is nothing in the contract entered into between these parties in Vermont that is contrary to the purpose of the New Hampshire Compensa-

tion Act as defined by the Court of that state in *Mulhall* v. *Nashua Mfg. Co.*, 80 N. H. 194, or inimical to the welfare of its citizens and the public policy of that state; and according to the trend of decisions in other jurisdictions, the rights of the parties should have been held to be governed by the Vermont contract, which provided for the plaintiff's only and exclusive relief for the death of her intestate.

Dissenting Opinion, Record, pp. 380, 381, 385.

* * * * *

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

Your petitioner presents to this Court and files herewith as an exhibit hereto a duly certified transcript of the entire record in the case as the same appears in the United States Circuit Court of Appeals.

Your petitioner, Bradford Electric Light Company, Inc., has appealed from the decision of the Circuit Court of Appeals rendered June 29, 1931, and said appeal is now pending. Your petitioner desires to have said petition for writ of certiorari considered in connection with said appeal.

Respectfully submitted by

BRADFORD ELECTRIC LIGHT COMPANY, INC.,

By WILLIAM E. LEAHY,
GEORGE T. HUGHES,
STANLEY M. BURNS,
Counsel for Petitioner.